No. 01-1297

Supreme Court, U.S.
FILED
MAY 8 2002

IN THE

Supreme Court of the United States

CHARLES L. GRIMES AND GORDON W. CHAPLIN, TRUSTEES UNDER THE WILL OF LOUISE C. CHAPLIN; CHARLES L. GRIMES AND GORDON W. CHAPLIN, TRUSTEES UNDER THE LOUISE D. CATHERWOOD TRUST; AND GORDON W. CHAPLIN, INDIVIDUAL TRUSTEE OF THE JESSICA D. CATHERWOOD TRUST,

Petitioners,

v.

NAVIGANT CONSULTING, INC.; POLICEMEN AND FIREMEN RETIREMENT SYSTEM OF THE CITY OF DETROIT; *et al.*,

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

REPLY BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

THADDEUS HOLT
P.O. Box 440
Point Clear, Alabama 36564
(334) 990-7495
(Counsel of Record)

DAVID A. JENKINS
JOELLE E. POLESKY
SMITH, KATZENSTEIN & FURLOW LLP
800 Delaware Avenue, 7th Floor
P.O. Box 410
Wilmington, Delaware 19899
(302) 652-8400

Attorneys for Petitioners

May 8, 2002

The brief in opposition[1] suggests that "[t]here is no reason to grant certiorari in this case," notwithstanding the pendency before this Court of the identical issue in *Devlin* v. *Scardelletti*, No. 01-417 (Br. in Opp. at 5),[2] because all the issues raised by petitioners have allegedly been decided against them in another case and hence petitioners will be barred below by *res judicata* when the case is remanded. But the brief's characterization of the issues raised in the courts below is not correct. Even if it were, *res judicata* would neither end this case nor render grant of certiorari inappropriate.[3]

Res Judicata Is Inapplicable To Petitioners' Claims Below.

The central argument of the brief in opposition is that all the issues on which petitioners' objections to

---

[1] The brief in opposition purports to be filed on behalf of "Respondent Plaintiff Class." But the relevant respondent is Policemen and Firemen Retirement System of the City of Detroit, the appointed representative of the plaintiff class.

[2] The brief also suggests that the second issue raised by the Petition–if intervention by class members who are not named parties is necessary in order to appeal, should the requirement be more onerous than a *pro forma* post-judgment intervention pursuant to an unconditional right to intervene–does not make this case more worthy of certiorari "since [Petitioners] already presented that very argument to the Court as an *amicus* in *Devlin*" (Br. in Opp. at 5 n.4). This reasoning is misplaced, because this Court may never reach that issue in *Devlin*, either because a decision is made on other grounds or because this Court determines that this second issue was not properly raised by the petitioner in *Devlin*.

[3] Consistent with Rule 15.6, we here address only the new points raised in the brief in opposition–its Argument II. Its other substantive argument–Argument III–is covered completely in the Petition.

the settlement were based have been decided in a different suit, *viz.*, an action filed as an individual shareholder by Charles L. Grimes, who is one of the trustees who are petitioners here (the "Grimes Action"). Thus, the argument runs, even if this action is remanded to the courts below, petitioners would be barred by *res judicata*, so that grant of certiorari here would be pointless. (Br. in Opp. at 6-8).

This argument is wrong for two reasons. First, one of the two key issues raised by petitioners' objection to the settlement here was neither raised nor decided in the Grimes Action, nor could it have been.[4] Second, the parties in this action and the Grimes Action are neither the same nor in privity with one another.

A. A major issue asserted in this action was neither raised nor decided in the Grimes Action, nor could it have been.

The brief in opposition ignores that petitioners objected to the settlement of this class action on not one but *two* grounds. One of these grounds–that the settlement notice did not meet the requirements of the Private Securities Litigation Reform Act of 1995 ("PSLRA"), in that the fees sought by lead counsel were greater than that set out in the settlement notice to the stockholder class (Pet. at 5)—obviously could not have been raised in the Grimes Action (which nowhere

---

[4] The brief in opposition wrongly accuses petitioners of failing to disclose the existence of the Grimes Action (Br. in Opp. at 6). To the contrary, this is fully revealed in the Petition (Pet. at 3-4). On the other hand, the brief in opposition incorrectly repeats the misstatement by the Seventh Circuit that Mr. Grimes sought to consolidate the Grimes Action with this matter (*Compare* Br. in Opp. at 3 *with* Pet. at 4 n.3).

concerned the conduct of lead counsel in this case below); it was not there raised or decided, nor could it have been. For this reason alone, *res judicata* cannot apply to this ground for objection and thus offers no basis on which to deny the Petition. *See, e.g., Roboserve, Inc.* v. *Kato Kagaku Co.*, 121 F.3d 1027, 1034 (7th Cir. 1997) (noting that for *res judicata* to apply all three criteria "'must be met'"—identity of the cause of action, identity of the parties or their privies, and final judgment on the merits) (citation omitted).

B. The parties in this action and the Grimes Action are neither the same, nor in privity with one another.

The argument also ignores that Mr. Grimes, although involved in both this case and the Grimes Action, does so in different capacities: here, as a co-trustee of certain trusts; in the Grimes Action, in his individual capacity as a shareholder.[5] It is well established that a "party appearing in an action in one capacity, individual or representative, is not thereby bound by or entitled to the benefits of the rules of res judicata in a subsequent action in which he appears in

---

[5] As the brief in opposition notes, the Grimes Action was dismissed by the United States District Court for the Northern District of Illinois before deciding whether it should be treated as a class action (Br. in Opp. at 4). That dismissal has been appealed to the United States Court of Appeals for the Seventh Circuit, No. 02-1569.

another capacity." RESTATEMENT (SECOND) OF JUDGMENTS § 36(2) (1980);[6] *see also, e.g., Warnock* v. *Pecos County*, 116 F.3d 776, 778 (5th Cir. 1997) (citing Restatement); *Roy* v. *City of Augusta*, 712 F.2d 1517, 1522 (1st Cir. 1983) (applying Maine law and holding that action not barred by *res judicata* because it brought against individual in a different capacity as prior action); *Jones* v. *Texas Tech Univ.*, 656 F.2d 1137, 1143 (5th Cir. 1981) (referring to the "general 'rule of differing capacities'"); *Hamilton Group, Inc.* v. *Welch*, C.A. No. 3:96-CV-2950, 1997 WL 560775, at *2 (N.D. Tex. Sept. 2, 1997) (holding res judicata inapplicable to claim asserted against defendant in representative capacity where defendant had, in prior suit, been plaintiff in individual capacity); *Resolution Trust Corp.* v. *Farmer*, 836 F. Supp. 1123, 1132 (E.D. Pa. 1993) (citing Restatement); *Hudgins* v. *Davidson*, 127 B.R. 6, 8 (E.D. Va. 1991) (referring to the "capacities rule"); *Capone* v. *Globe Air, Inc.*, 625 F. Supp. 1566, 1568 (D. Maine 1986).

This rule of different capacities has been applied to determine that *res judicata* does not bar a trustee from later pursuing an action in an individual capacity. *See, e.g., Hurt* v. *Pullman Inc.*, 764 F.2d 1443, 1448 (11th Cir. 1985) (citing Restatement, and noting that

---

[6] One scenario in the comment to the Restatement (Second) of Judgments reflects the precise difference between actions by Mr. Grimes individually, and actions by him as a trustee:

> A, as trustee for his children brings an action to quiet title in Blackacre against B. The judgment, whether for A or B, does not preclude A from bringing an action to enforce a claim to Blackacre on his own behalf.

RESTATEMENT (SECOND) OF JUDGMENTS § 36 cmt. b, illus.1.

the "case law has applied this principle in numerous cases in which a party appears in one suit as a fiduciary or trustee, and in another suit in an individual capacity"); *see also McIntosh* v. *Johnson*, 649 So.2d 190, 193-94 (Miss. 1995), *overruled on other grounds*, *Norman* v. *Bucklew*, 684 So.2d 1246 (Miss. 1996) (referring to the Restatement, and holding that a church trustee representing the church in a land dispute was not barred from later bringing a suit individually based on the same disputed land).

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

THADDEUS HOLT
P.O. Box 440
Point Clear, Alabama 36564
(334) 990-7495
(*Counsel of Record*)

DAVID A. JENKINS
JOELLE E. POLESKY
SMITH, KATZENSTEIN & FURLOW LLP
800 Delaware Avenue, 7th Floor
Post Office Box 410
Wilmington, Delaware 19899
(302) 652-8400

Attorneys for Petitioners

May 8, 2002